STATE OF MICHIGAN

COURT OF APPEALS

HATHERLY ASSOCIATES, INC., Petitioner-Appellant,	UNPUBLISHED June 29, 2010
v	No. 291100 Tax Tribunal
MICHIGAN DEPARTMENT OF TREASURY, Respondent-Appellee.	LC No. 00-350317

Before: BANDSTRA, P.J., and FORT HOOD and DAVIS, JJ.

PER CURIAM.

Petitioner appeals as of right from the order of the Michigan Tax Tribunal (MTT) granting respondent's motion for reconsideration and dismissing petitioner's petition for lack of jurisdiction. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Petitioner bought a motor home out of state and brought it into Michigan. Respondent assessed petitioner use tax for the vehicle, and on February 29, 2008, respondent issued Final Assessment P651967 for $60,000 in use tax, $15,000 penalty, and $15,283.64 in accrued interest. The final assessment was sent by certified mail to the address on file for petitioner, in Hudsonville. Under MCL 205.28(1)(a), notice of the assessment "shall be given either by personal service or by certified mail addressed to the last known address of the taxpayer." Respondent alleged that the assessment was mailed on February 22, 2008. The tracking system for the United States Postal Service (USPS) indicated the letter was delivered on March 7, 2008. Petitioner appealed the assessment to the Michigan Tax Tribunal (MTT) on May 29, 2008, 83 days after it was delivered.

Respondent moved for summary disposition under MCR 2.116(C)(4), asserting that the MTT lacked jurisdiction because the appeal was not timely under MCL 205.22(1), which allows only 35 days to appeal an assessment to the MTT.[1] Petitioner argued that it had not been

[1] The relevant portion of MCL 205.22(1) reads, "A taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision, or order to the tax tribunal within 35 days, or to the court of claims within 90 days after (continued…)

properly served notice of the final assessment, specifically, that it never received the assessment allegedly delivered on March 7, 2008, and that it was told by respondent that the final assessment issued on April 26, 2008. Petitioner pointed out that respondent did not provide a return receipt that would prove delivery.

The MTT found there were issues of fact concerning the notice given petitioner. The MTT noted that respondent's motion brief identified *two* USPS tracking numbers but provided a delivery date only for one. It also found that respondent could not have mailed the final assessment on February 22, 2008, because the assessment was dated a week *after* that. The MTT concluded that respondent's confusion about tracking numbers indicated either it was unsure of petitioner's address, or it sent conflicted notices. Viewing the evidence in the light most favorable to petitioner, the MTT utilized the April 26, 2008, issue date alleged by petitioner and therefore concluded the appeal was timely.

Respondent moved for reconsideration. In its motion brief, respondent stated that the second tracking number had been inadvertently included in the brief; the only relevant tracking number was the one delivered on March 7, 2008. Respondent also provided an affidavit explaining that assessments are post-dated one week to allow processing time, resolving the apparent anomaly of the assessment being dated after it had been mailed.

The MTT found there had been a palpable error in the earlier proceedings. Respondent was not required to prove actual notice but only notice reasonably calculated to reach petitioner. There was no dispute that respondent had used petitioner's correct address, and respondent had explained why the assessment was dated February 29, 2008, but mailed on February 22, 2008. The MTT found that the final assessment was issued on February 29, 2008, and that respondent complied with the requirement in MCL 205.28(1)(a) that notice be mailed by certified mail to the taxpayer's last known address.

In this Court, petitioner alleges that the MTT erred when it found that respondent satisfied the notice requirement of MCL 205.28(1)(a) because respondent cannot produce the green card proving receipt by petitioner. Respondent answers that, under MCL 205.28(1)(a), it is neither required to request a return receipt nor to produce one to prove that the final assessment was delivered. The statute requires it to serve notice by means that is reasonably calculated to reach petitioner. There is no dispute that respondent used the correct address and USPS records indicate it was delivered there on March 7, 2008. The certified mailing was not returned to respondent and there is no indication that it was not delivered.

In the absence of fraud, our review of a decision by the Tax Tribunal is limited to determining whether the tribunal erred in applying the law or adopted a wrong principle; its factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Continental Cablevision v Roseville*, 430 Mich 727, 735; 425 NW2d 53 (1988). Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence. *Jones & Laughlin Steel Corp v Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992).

(…continued)

the assessment, decision, or order."

Petitioner contends that the notice requirement was not satisfied because respondent failed to produce a "green card" demonstrating proof of receipt. However, the requirement of "certified mail to the last known address," MCL 205.28(1), does not require production of documentation establishing proof of receipt. Rather, certified mail is a postal service classification that "provides a mailing receipt to the sender and a record of delivery at the office of address." *W A Foote Memorial Hosp v Jackson*, 262 Mich App 333, 338; 686 NW2d 9 (2004) (citations omitted). The purpose of certified mail is to record the date of mailing and to prevent stale claims. *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538, 549-550; 656 NW2d 215 (2002). The MTT's determination that the final assessment was delivered on March 7, 2008, is a factual finding. That finding is supported by the evidence from the USPS "track and confirm" system that shows that the letter was delivered. This is "competent, material, and substantial evidence" of delivery, and therefore this finding is conclusive.

The issue of whether respondent's efforts provided legally sufficient notice is a question of law. See *Jackson v Detroit Medical Center*, 278 Mich App 532, 544-545; 753 NW2d 635 (2008). First, the statute does not require proof of delivery. It only requires either personal service or service "by certified mail addressed to the last known address of the taxpayer." MCL 205.28(1)(a). Respondent's documents of record establish that it sent the final assessment by certified mail to the last known address of the taxpayer. It also has shown that the mailing was delivered. Thus, there was no indication that petitioner failed to receive the mailing.

Second, our Supreme Court summed up the due process requirements of notice in *Sidun v Wayne Co Treasurer*, 481 Mich 503, 509; 751 NW2d 453 (2008) (internal citations, quotation marks, and brackets omitted):

> A fundamental requirement of due process in such proceedings is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Interested parties are entitled to have the government employ such means as one desirous of actually informing them might reasonably adopt to notify them of the pendency of the proceedings. That is, the means employed to notify interested parties must be more than a mere gesture; they must be means that one who actually desires to inform the interested parties might reasonably employ to accomplish actual notice. However, due process does not require that a property owner receive actual notice before the government may take his property.

Respondent mailed the final assessment by certified mail, had information that the final assessment was delivered, and had no information to the contrary. There is no dispute that respondent used the correct address. Thus, respondent took steps reasonably calculated to inform petitioner of the assessment.

Affirmed.

/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood
/s/ Alton T. Davis